line" stations – that have historically received a minimum listening share in a Metro.[585]

280. The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros.[586] The BIA database relies on Arbitron's market definitions and builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets [587] Given our experience with the BIA database and its acceptance in the industry, we will count as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as "home" to that Metro), as determined by BIA [588] We also will include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary.[589] By including these stations in the Metro, our counting methodology will reflect more accurately the competitive reality recognized by the radio broadcasting industry.[590] It is also quite sensible. Because we require radio stations to serve their communities of license, we know that stations licensed to communities in a particular Metro represent a source of competition within that Metro.[591] In addition to serving its community of license, to the extent that a radio station competes beyond that, it is

[585] Stations that have no reportable audience share in a Metro may remain as a below-the-line station if they historically have received a minimum audience share in the Metro

[586] See, *e g* , *Whitehall Enterprises, Inc* , 17 FCC Rcd 17509 (2002) BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

[587] For example, Arbitron counts only commercial stations that meet certain minimum reporting standards *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 5, 2003), Attachment at 1 n 4 BIA attempts to include every commercial and noncommercial radio station licensed in each Metro. *Defining Moment in Radio* at 16. BIA also may determine on its own whether a particular station licensed to a community outside of a Metro should be listed as "home" to that Metro *Id*

[588] *See, e g , id* If the BIA database counts any foreign radio stations as participating in a particular Metro, we also will count those stations in the relevant market *See id* at 17, Jefferson-Pilot Comments in MM Docket No. 01-317 at 8-9.

[589] We will rely on the Commission's broadcast database in determining the communities of license of radio stations. In the rare case where the boundaries of a community of license cross a boundary between two radio markets, we will consider the radio stations licensed to that community to participate in both markets.

[590] By counting every radio station that is located in a Metro, we resolve concerns that Arbitron does not include stations that have less than a minimum audience share. *See* WVRC Comments in MM Docket No. *01-317* at *30* n 63, 31, Cumulus Comments in MM Docket No. 01-317 at 25; WVRC Comments in MM Docket No. 00-244 at 24, Cox Comments in MM Docket No 00-244 at 10, Letter from Jack N Goodman, NAB, to Michael K. Powell, Chairman, FCC (May 29, 2003) at 2 ("NAB May 29, 2003 Ex Parte")

[591] *See* UCC Comments in MM Docket No 01-317 at 12-13. NAB claims that a community of license test produces a different market size count than a "home" market test. NAB May 29, 2003 Ex Parte at 2. However, NAB's own data suggest that the market tier would be the same under either test in over 60% of Metros *Id.*, Attachment. Moreover, our counting methodology appears different from the one NAB used in its analysis. For example, NAB appears to have excluded stations from markets in which their communities of license are located if such stations are home to another Metro. As we explain in the following footnote, we always count a station as participating in the market in which its community of license is located.

likely to serve the larger out-lying metropolitan areas that also comprise Arbitron Metros.[592] Accordingly, we find it is appropriate to count these radio stations in determining the size of an Arbitron Metro.[593]

281. We reject arguments that we should count below-the-line stations in determining the size of a Metro's radio market.[594] Below-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from radio stations located in the market.[595] NAB estimates that, on average, approximately 70% of radio listening within a market is "attributable to commercial stations listed as being home to that market."[596] Bear Stearns likewise estimates that local radio stations generally capture a disproportionate share of the local markets' listening share and revenue share.[597] Although we recognize that, in certain instances, certain below-the-line radio station may have a competitive impact in the market for radio listening, we believe that, on balance, counting every below-the-line radio station would produce a distorted picture of the state of competition in a particular Metro.[598]

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[592] It is for this reason that a radio station located outside of a Metro occasionally may be included as home to that Metro In such cases, we will count that station as participating in the radio market in which its community of license is located in addition to the Metro We believe this simple rule will help prevent odd results in cases where a station requests "home" status in order to be viewed as a participant in another (usually larger) Metro. *See, e g* , *Great Scott Broadcasting*, 17 FCC Rcd 5397, 5406 ¶ 25 (2002) (noting that a radio station that was licensed to Trenton, New Jersey and was the second highest rated station in the Trenton Metro was listed as home to the Middlesex-Somerset-Union Metro), *see also* Viacom May 7, 2003 Ex Parte at 3; NAB May 29, 2003 Ex Parte at 3

[593] We disagree with commenters contend that contend that the "home" status designation is unreliable. *See, e g.*, Nassau Comments in MM Docket No 01-317 at 8-9 Because a station will always be considered to participate in the radio market in which its city of license is located, the "home" status designation only affects radio stations licensed outside of the Metro to which it is home It makes sense to us, moreover, to count those stations in the market in which they are commercially recognized as competitors

[594] *See, e g* , Aurora Comments in MM Docket No 00-244 at 12, Viacom May 7, 2003 Ex Parte

[595] *See, e g* , UCC Comments in MM Docket No 01-317 at 12-13.

[596] NAB Comments in MM Docket No. 01-317 at 4. We expect that listening to in-market stations is even higher when noncommercial stations are taken into account

[597] *Defining Moment in Radio* at 12 Bear Stearns states that the mean of audience share and revenue share that the top 3 in-market radio station groups receive is 58.9% and 82.9%, respectively. Bear Stearns concludes that "'out-of-market' players are probably not as significant in competing for local dollars as are 'in-market' players." *Id* Bear Stearns also notes that "the radio business, more than any other measured media, is a local medium" and that "78% of the radio industry's revenues are derived from local advertisers." *Id.* We have previously observed that local businesses may not find out-of-market radio stations to be adequate substitutes for in-market stations. *See, e g* , *Youngstown Radio License, L L.C.*, 17 FCC Rcd 13896, 13903 ¶ 20 (2002).

[598] This distortion generally can occur in two ways First, counting every below-the-line station as numerically equal to every in-market station would artificially inflate the size of radio markets Second, it could unnecessarily restrict consolidation *across* markets because a party's ownership interest in a radio station in one market could also count against that party in an adjacent market solely by virtue of such station obtaining a minimal audience share in the adjacent market. *See Defining Moment in Radio* at 13-14.

### (ii) Areas Not Located in an Arbitron Metro

282 Arbitron Metros do not cover the entire country, the 287 Arbitron Metros cover approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population above the age of 12 in the United States, including Puerto Rico.[599] Several commenters have raised concerns concerning the appropriate method of defining radio markets in areas of the country not covered by Arbitron Metros.[600]

283. One possibility, in the absence of a pre-defined radio market, is to determine the relevant radio market on a case-by-case basis, in the context of an individual application. Such a process, however, would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters.[601] The better course is to develop radio market definitions for non-Metro areas through the rulemaking process [602] We believe that would provide the most expeditious way to delineate appropriate radio market boundaries for the entire country and give all interested parties clear guidance about how we will analyze a proposed radio station combination under the local radio ownership rule. Because the rulemaking record in this proceeding provides little information about the appropriate boundaries of specific non-Metro radio markets,[603] we initiate below a new rulemaking proceeding to seek comment on that issue.

284 While that rulemaking proceeding is pending, we will need to process applications proposing radio station combinations in non-Metro areas and determine whether such combinations comply with the local radio ownership rule. Although we find the contour-overlap methodology problematic for the reasons stated above, we conclude that its temporary use during the pendency of the rulemaking proceeding cannot be avoided. Conducting a case-by-case analysis would create significant regulatory uncertainty, and adopting an ill-considered "proxy" geographic market could produce unforeseeable distortions. The contour-overlap methodology is, at a minimum, well understood, and continuing its use for a few additional months would allow for the orderly processing of radio station applications

285. Although we find it necessary to maintain the contour-overlap market definition for an additional period of time, we will make certain adjustments to minimize the more problematic aspects of that system. Specifically, we adopt NAB's proposal to exclude from the market (*i.e.*, the denominator)

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[599] MOWG Study No. 11 at 4-5 & nn 6 & 7.

[600] *See, e g* , NAB Comments in MM Docket No 01-317 at 35; WVRC Comments in MM Docket No. 01-317 at 29, Cumulus Reply Comments in MM Docket No. 01-317 at 5; WVRC Comments in MM Docket No. 00-244 at 23; Disney Comments in MM Docket No 00-244 at 3, Viacom Comments in MM Docket No. 00-244 at 7; NextMedia Comments in MM Docket No 00-244 at 4, NAB Comments in MM Docket No. 00-244 at 15; Entercom Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 6; Cox Comments in MM Docket No. 00-244 at 9; Brill Comments in MM Docket No. 00-244 at 2.

[601] *See, e g* , Letter from Lewis W Dickey, President, Cumulus Media, to Michael K. Powell, Chairman, FCC (May 19, 2003) at 2

[602] NAB May 23, 2003 Ex Parte at 2-3

[603] *Id*

radio stations that are commonly owned with the stations in the numerator.[604] This will prevent a party from "piggy-backing" on its own stations to bump into a higher ownership tier. We also will adopt NAB's suggestion that we exclude from the market any radio station whose transmitter site is more than 92 kilometers (58 miles) from the perimeter of the mutual overlap area.[605] This will alleviate some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio stations and thereby brings them into the market.

286 We will require parties proposing a radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro boundary to show compliance with the local radio ownership rule using the interim contour-overlap methodology [606] In making that showing, parties should include in the numerator and denominator radio stations that meet the criteria for inclusion under that methodology (as modified by the preceding paragraph) regardless of whether they are included in Arbitron Metros We emphasize, however, that the interim contour-overlap methodology may not be used to justify radio station combinations in Arbitron Metros that exceed the numerical limits of the local radio ownership rule; in all cases, parties must demonstrate – using the standards for Arbitron Metros described above – that they comply with those limits in each Metro implicated by the proposed combination.

#### (iii) Modification to The Local Radio Ownership Rule

#### (a) Analysis of the Current Numerical Limits

287 Having discussed the relevant product and geographic markets for radio, we now undertake our obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition.[607] With respect to the ownership tiers, we conclude that the current rule meets that standard. We find, however, that the rule improperly fails to consider the effect that noncommercial stations can have on competition in the local radio market. We accordingly modify the rule to count noncommercial radio stations in determining the size of the radio market.

288. We conclude that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition. In radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed. Radio broadcasting is thus a closed entry market, *i.e* , new entry generally can occur only through the acquisition of spectrum inputs from existing radio broadcasters.[608] The closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio

[604] *Id*

[605] *Id*

[606] The interim methodology will be triggered even if a radio station is "home" to an Arbitron Metro, as long as its community of license is located outside of the Metro.

[607] Although the numerical limits in the local radio ownership rule traditionally have been focused on ensuring "Local Radio Diversity," *see* 1996 Act, § 202(b), we rely primarily on our competition goal to justify the rule *See Fox Television*, 280 F.3d at 1042

[608] The need for governmental approval also imposes costs on new entry into the market

broadcasting Numerical limits on radio station ownership help to keep the available capacity from becoming "locked-up" in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.

289 Although competition theory does not provide a hard-and-fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[609] The current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio station firms of roughly equal size.[610] An analysis of the top 100 Metro markets indicates that many of them fall within this range.[611]

290 We find that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets. We acknowledge that many radio markets currently have more than 6 radio station firms. According to MOWG Study No. 11, the top 50 Metros have an average of 19 9 radio station owners, the next 50 Metros have an average of 11.4 owners, and the remaining Metros have an average of 6.7 owners.[612] We also consider, however, that radio stations are not all equal in terms of their technical capabilities (*i.e.*, each radio station covers a population with varying levels of signal quality), and that the technical differences among stations can cause radio stations groups with similar numbers of radio stations to have vastly different levels of market power. Thus, although the top 50 Metros have an average of 19.9 owners, the top station group in each of those Metros has, on average, 35.2% of the revenue share, and the top four groups receive, on average, 86.1% of the revenue share.[613] The top four firms also dominate audience share.[614] According to the Future of Music Coalition, the top four firms receive 77.1% of the audience share in the top 10 Metros,

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[609] A game-theoretic analysis of the number of independent firms that are required to produce competitive market performance is provided by R Selter, *A Simple Model of Imperfect Competition Where Four are Few and Six are Many*, INT'L J GAME THEORY 2 (1973) This model is presented more intuitively in Louis Phillips, COMPETITION POLICY. A GAME THEORY PERSPECTIVE Ch 2 (Cambridge, UK: Cambridge Univ. Press 1995) An empirical study which finds that additional market entry has little effect on market conduct once a market has between three and five firms is provided by Timothy F Bresnahan and Peter C Reiss, *Entry and Competition in Concentrated Markets*, 99 J OF POL. ECON 997-1009 (1991). These limits roughly comport with the limit in the DOJ/FTC Merger Guidelines between moderately- and highly-concentrated markets *DOJ/FTC Guidelines* § 1.51.

[610] Markets with 27 radio stations must have at least 4.5 owners (27 stations divided by the 6 station limit) Markets with 51 radio stations must have at least 6 375 owners (51 stations divided by 8 station limit)

[611] *Defining Moment in Radio* at 21. Our own analysis of BIA data confirms this conclusion

[612] MOWG Study No. 11, App D.

[613] *Id* In Metros 51 to 100, the average revenue shares for the top firm and the four top firms are 42.8% and 93 5%, respectively In Metros 101-287, the figures are 50 9% and 95%, respectively.

[614] The radio stations that receive the highest audience shares tend to receive a disproportionate portion of the revenue shares. *See Defining Moment for Radio* at 12, *see also* Arbitron, Radio's Leading Indicator: Audience ratings and the impact on revenue, available at http://www.arbitron.com/downloads/leadindicator2002 pdf.

84 7% in Metros 11 to 25, and 85 8% in Metros 26-50.[615] Bear Stearns' analysis also shows that, in the top 100 radio markets, the top three radio groups receive a median of 82 9% of the revenue share and 58 9% of the audience share.[616] And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates [617] This data suggests that the current numerical limits are not unduly restrictive.[618]

291. For markets with more than 51 radio stations, the number of radio station firms ensured by the rule increases as the size of the market increases. Because of this, some parties argue that we should raise the numerical limits to permit common ownership of more than eight radio stations in larger markets.[619] We reject that argument. There is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations [620] On the other hand, extremely large radio markets tend to cover a large area geographically and also tend to be more "crowded" in terms of radio signals. As a result, large markets may include a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other.[621] Both of these phenomena may make a large market appear more competitive than it actually is [622] For example, there are approximately 84 radio stations (52 FM and 27 AM) licensed to the Los Angeles Metro. Of the FM stations, twenty-three are Class A or Class D stations, the weakest classes of FM stations. Of the 27 AM stations in Los Angeles, only five are 50 kilowatts and three are 20 kilowatts. The remaining 19 AM stations include one 10 kilowatt station and 18 stations with a power of 5 kilowatts or less. Some of these technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.[623] But even in Los Angeles, the second largest radio market in the nation, the top one,

[615] FMC Comments at 33. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93 9%, respectively *Id*

[616] *Defining Moment in Radio* at 12

[617] MOWG Study No 4 at 18

[618] We see no significant benefit in tinkering with the basic structure of the tiers. *See, e g*, Hodson Comments in MM Docket No 01-317 at 7 (proposing six-tier framework) Bear Stearns argues that we should adjust the tiers because, in its view, Arbitron Metro markets contain on average fewer stations than the current contour-overlap markets *Defining Moment in Radio* at 21-25. We reject that argument. The purpose of developing a sound market definition methodology is to enable us to measure concentration levels more accurately. We do not see why that should affect the level of concentration we permit in a (properly defined) market.

[619] *See Defining Moment in Radio* at 21-22, Viacom May 5, 2003 Ex Parte at 11.

[620] No party contends that radio broadcasting is a natural monopoly, *i e.*, that one firm can always provide service more efficiently than two or more firms.

[621] *See, e g*, NextMedia Comments in MM Docket No. 00-244 at 5; *accord* Letter from Jeffrey H. Smulyan, Chairman and CEO, Emmis Communications to Michael K. Powell, Chairman, FCC (May 30, 2003), Letter from Lee J. Peltzman, Shainis and Peltzman, to Marlene H Dortch, Secretary, FCC (May 7, 2003) (Peltzman May 7, 2003 Ex Parte Letter)

[622] In addition to our decision to cap radio station ownership at 8 stations, we take the technical differences of radio stations into account by maintaining separate AM and FM limits.

two, and four radio station firms receive 31.2%, 60 2%, and 76 1%, respectively, of the revenue share.[624] By capping the numerical limit at eight stations, we seek to guard against consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting [625]

292. We also decline to make the numerical limits more restrictive. In the smallest radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market Although this would be considered highly concentrated from a competitive point of view, the Commission has recognized that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets.[626] Given these concerns, we find it reasonable to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute

293. In analyzing the level of concentration in radio markets that would be consistent with the public interest, we seek both to ensure a healthy, competitive radio market and enable radio owners to achieve significant efficiencies through consolidation of broadcast facilities. Prior to 1992, the local radio ownership rule did a poor job of recognizing that a certain level of consolidation can be efficient. Given the generally difficult economic conditions at the time, the inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties. We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry; we seek to ensure that such consolidation does not reach the point of stifling competitive incentives. Because we believe that the current numerical limits by and large strike the appropriate balance,[627] we reaffirm those limits.

294. We also reaffirm the AM and FM ownership limits in the current rule Eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations. AM stations have significantly less bandwidth than FM stations, and the fidelity of their

(Continued from previous page)

[623] It is for this reason that we cannot agree with certain commenters' arguments that we should allow greater consolidation of less powerful radio facilities in a local market *See, e g*, Letter from John S Logan, Dow, Lohnes & Albertson, to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Linda G. Morrison, Leventhal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 28, 2003); NextMedia Comments in MM Docket No 00-244 at 4-5. The local radio ownership rule takes into account differences in power and class of radio stations where appropriate We see no feasible way to account for unique market conditions or individual company holdings without frustrating our goal of providing regulatory certainty through relatively simple, bright-line rules

[624] MOWG Study No. 11, App F

[625] *See infra* ¶¶ 296-301.

[626] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (competitive realities are substantially different in markets of different sizes). *See also* Cumulus Comments in MM Docket No. 01-317 at 18-20.

[627] *See Sinclair*, 284 F 3d at 162; *AT&T Corp. v FCC*, 220 F.3d 607, 627 (D C Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"), *Health and Medicine Policy Research Group v FCC*, 807 F.2d 1038, 1043 (D.C Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"), *Hercules Inc v EPA*, 598 F 2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness").

audio signal is inferior to that of FM stations.[628] Unlike FM stations, moreover, AM signal propagation also varies with time of day. During the day, AM signals travel through ground currents for between 50 to 200 miles, at night, AM signals travel further because they are reflected from the upper atmosphere. As a result, "many AM stations are required to cease operation at sunset."[629] These and other technical differences[630] have an effect on radio listenership patterns. As of 2002, 82% of radio audience comes from the FM service, while 18% of radio audience comes from the AM service.[631] Radio formats also can be affected In Los Angeles, for example, our analysis indicates that many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations. We cannot agree, therefore, that eliminating the service caps and treating AM and FM radio stations equally for purposes of the overall station limit is consistent with our interest in protecting competition in local radio markets.

295 Although we reaffirm the ownership tiers in the local radio ownership rule, we conclude that it is not necessary in the public interest to exclude noncommercial radio stations in determining the size of the radio market. Although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets.[632] Indeed, noncommercial stations can receive a significant listening share in their respective markets.[633] Their presence in the market therefore exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners. In television, we have recognized the contribution that noncommercial stations can make to competition by counting noncommercial stations in determining the size of the television market We see no reason to treat noncommercial radio stations differently

#### (b) Rejection of Repeal and Other Modifications

296 We reject arguments that we should repeal the local radio ownership rule. We see nothing in the record that persuades us that the acquisition of market power in radio broadcasting serves the public

[628] *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 17 FCC Rcd 19990, 19997 ¶ 19 (2002) The development of in-band, on-channel technology may help AM stations overcome this limitation *See id.*

[629] *Id*

[630] *See generally Review of Technical Assignment Criteria for the AM Broadcast Service*, 2 FCC Rcd 5014 (1987), *Review of Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990); *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, 3 FCC Rcd 6448 (1988)

[631] *See* Arbitron National Radio Services, Tracking Trends at http.//www Arbitron com/national_radio/home.htm (visited May 11, 2003); *see also* Peltzman May 7, 2003 Ex Parte at 1. Viacom argues that "four of the ten highest billing stations in the country are AM stations " *See* Letter from Meredith Senter, Levanthal, Senter & Lerman, to Marlene H Dortch, Secretary, FCC (May 15, 2003) at 3. We fail to see how looking at only the top ten billing stations provides much information about the relative strength of AM and FM stations across the country. To the contrary, the fact that a few high-power AM stations are comparable to FM stations in terms of billing capability weighs against Viacom's alternative argument that we should disregard AM ownership entirely *Id.*

[632] *See, e g* , Viacom May 5, 2003 Ex Parte at 4

[633] *See, e g.*, Viacom May 7, 2003 Ex Parte at 2

interest[634] As we explain in the Policy Goals section, we are committed to establishing a regulatory framework that promotes competition in the field of broadcasting Competition breeds innovation in programming and creates incentives to continually improve program quality.[635] Because competition – and the benefits that flow from it – is lessened when the market is dominated by one or a few players, we seek through our rules to prevent that type of market structure from developing

297. Without some check, a party could acquire all or a significant portion of the limited number of broadcast radio channels in a local community, leaving listeners, advertisers, and program producers with fewer substitutes. That situation also would raise the cost of entry into the market by new entrants because there would be fewer radio stations available from which a party could construct a competing station group.[636] Because the most potent sources of innovation often arise from new entrants,[637] a market structure that significantly raises the costs of entry leads to less-than-optimal results in terms of innovation and program quality and thereby harms the public interest.[638] It is therefore necessary for us to impose limits on the number of radio stations a party may own in a local market to preserve competition in the relevant markets in which radio stations compete.[639]

298. Several commenters argue that the local radio ownership rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits.[640] In the *Local Radio Ownership NPRM*, we asked for information on three specific markets – Syracuse, New York; Rockford, Illinois; and Florence, South Carolina Clear Channel is the largest group owner in Syracuse;[641] Cumulus is a large group owner in Rockford and Florence.[642] Clear Channel and Cumulus have provided detailed information highlighting the public interest benefits that they contend they have produced by consolidating radio stations in those markets, such as greater investment in facilities and

[634] Most of the debate centers around whether radio broadcasting constitutes a separate relevant product market (we have concluded that it does) and the means we should use to protect competition in the relevant market (we have just answered that question) Although some parties have suggested that monopoly in broadcasting would promote program diversity, we find the evidence supporting that theory inconclusive *See infra* ¶¶ 307-315.

[635] *See, e g , EchoStar/DirecTV HDO*, 17 FCC Rcd at 20626 ¶ 176. *See also* Policy Goals, Section III, *supra.*

[636] *See* Dick Comments in MM Docket No 01-317 at 6, Hodson Comments in MM Docket No. 01-317 at 6.

[637] *See, e g , 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd at 6077 ¶ 28; *see also* MMTC Comments in MM Docket No 01-317 at 107

[638] *See* Policy Goals, Section III, *supra*

[639] *Id* Contains explanation of why we decide to rely on prescriptive rules rather than case-by-case analyses to promote our public interest objectives in media

[640] *See, e g*, Viacom Comments in MM Docket No 01-317 at 51, 60-63; Clear Channel Comments in MM Docket No 01-317 at 23-24.

[641] Clear Channel Comments in MM Docket No 01-317 at 24

[642] Cumulus Comments in MM Docket No 01-317 at 7

programming, including local news and public affairs.[643]

299. We do not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public.[644] Our responsibility under the statute, however, is to determine the level at which the harms of consolidation outweigh its benefits, and to establish rules to prevent that situation from developing And while Clear Channel, Cumulus, and others highlight the public interest benefits that they were able to achieve through consolidation, we also seek to ensure that radio stations outside of the dominant groups can remain viable and, beyond that, can prosper. Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners.[645] Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner.[646] As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.[647] Although we decline to pass on the competitive situation in any particular radio market in the context of this rulemaking proceeding,[648] the concerns raised by these commenters comport with the competition analysis that underlies this order and supports our decision not to repeal the local radio ownership rule.

300 We also reject arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to "flag" applications that propose radio station combinations above a certain market share.[649] Several parties have suggested that we consider audience share or revenue share

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[643] Clear Channel Comments in MM Docket No 01-317, Exh 4, Cumulus Comments in MM Docket No 01-317 at 6-14, Cumulus Comments at 7-12 Clear Channel also filed similar information about other radio markets in which it operates Clear Channel Comments in MM Docket No. 01-317, Exh. 5.

[644] *See, e g* , NAB Comments in MM Docket No 01-317 at 44-45; Radio One Comments in MM Docket No 01-317 at 11-12; Viacom Comments in MM Docket No 01-317 at 60-62; Clear Channel Comments in MM Docket No. 01-317 at 23-24, Cumulus Comments in MM Docket No 01-317 at 5-6, 19, Zimmer Comments in MM Docket No 00-244 at 6, Weigle Comments in MM Docket No 00-244 at 6, Viacom Comments in MM Docket No 00-244 at 6, HBC Comments in MM Docket No 01-317 at 11-12, NAB Reply Comments in MM Docket No 01-317 at 11, Zimmer Comments in MM Docket No. 00-244 at 7.

[645] *See* AFTRA Comments in MM Docket No 01-317 at 2; North American Comments in MM Docket No 01-317 at 12, Blakeney Comments in MM Docket No. 01-317 at 2, MMTC Comments in MM Docket No 01-317 at 23-24, 45

[646] *See* North American Comments in MM Docket No. 01-317 at 11; Idaho Comments in MM Docket No 01-317 at 3, Dick Comments in MM Docket No. 01-317 at 3, MMTC Comments in MM Docket No 01-317 at 21.

[647] *See* AFTRA Comments in MM Docket No. 01-317 at 9; Daugherty Comments in MM Docket No 01-317 at 3; Kennelwood Comments at 1-3.

[648] *See, e g* , Kennelwood Comments at 8

[649] In August 1998 the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition. *See* Broadcast Applications, Rep. No. 24303 (Aug 12, 1998) Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market *See Applications of Shareholders of AMFM,* (continued... )

in determining the level at which common ownership of local radio stations becomes contrary the public interest[650] We recognize that competition analysis generally looks to market share as the primary indicator of market power. Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power is present.[651] In radio, the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, and in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit. We do not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer, our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. We do not believe that developing a market share limit would significantly advance that objective.

301 We recognize that our conclusion differs from the Commission's view in 1992 that an audience share cap was necessary "to prevent consolidation of the top stations in a particular local market."[652] But the audience share cap was never intended to be more than a "backstop" to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market.[653] The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place But because of the problems associated with the contour-overlap market definition and counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the *Local Radio Ownership NPRM.* Now that we have established a rational system for defining radio markets and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary *prima facie* showing that a proposed combination is contrary to the public interest.[654]

**b. Localism**

302 Our localism goal stems from our interest in ensuring that licensed broadcast facilities

(Continued from previous page)
*Inc, (Transferor) and Clear Channel Communication, Inc (Transferee)*, 15 FCC Rcd 16062, 16066 ¶ 7 n 10 (2000) ("*AMFM, Inc*") Flagged transactions were subject to a further competitive analysis, the scope of which is embodied in the interim policy set forth in the *Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89

[650] *See, e g*, Hodson Comments in MM Docket No 01-317 at 6-7; UCC Comments in MM Docket No. 01-317 at 27, NABOB Comments in MM Docket No. 01-317 at 5; Radio One Reply Comments in MM Docket No 01-317 at 3, Cumulus Comments at 14

[651] *See, e g*, *United States v Microsoft Corp*, 235 F.3d 34, 51, 54 (D.C. Cir. 2001); *TV FNPRM,* 10 FCC Rcd at 3535 ¶ 21

[652] *1992 Radio Ownership Order*, 7 FCC Rcd at 2781 ¶ 53.

[653] *Id*

[654] 47 U S C § 309(d)

serve and are responsive to the needs and interests of the communities to which they are licensed.[655] Our localism policy influences many of our broadcast policy decisions, including decisions relating to how radio spectrum is allocated and to the public interest obligations that are imposed on radio broadcasters.[656]

303. Some commenters argue that the local radio ownership rule harms localism by preventing efficient consolidation that promotes improved local service As explained in the Competition Section above, we agree that consolidation of radio stations can result in efficiencies. This does not mean, however, that all consolidation serves the public interest.[657] We recognize only those efficiencies that inure to the benefit of the public.[658] In a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality, which in this context contemplates programming that is responsive to the needs and interests of the local community. In a concentrated market, radio station firms have diminished incentive to compete vigorously. Smaller firms, moreover, may have insufficient resources to compete aggressively with the dominant firms in the market, which makes smaller firms less effective in meeting the needs and interests of their local communities. Thus, by preserving a healthy, competitive local radio market, the local radio ownership rule also helps promote our interest in localism.

304 Aside from the positive effect on localism that ensues from a competitive radio market, we see little to indicate that the local radio ownership rule significantly advances our interest in localism. In prior rulemaking proceedings, the Commission has not emphasized localism as one of the justifications for the local radio ownership rule,[659] and the record suggests no reason for adopting a different view here. Although some parties suggest that localism has suffered as a result of consolidation, the source of the alleged harm appears to be the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. Thus, Idaho Wireless contends that large group owners downsize local staff so that "they can run stations all over the country more cheaply,"[660] and UCC asserts that consolidation has resulted in "nearly identical programming" in *different* local markets.[661] These concerns do not address whether consolidation of radio stations in a *local* market would harm localism. National radio ownership limits are outside the scope of this proceeding.

### c. Diversity

305 *Viewpoint Diversity.* Viewpoint diversity "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

[655] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

[656] *Id.*

[657] *See 2000 CMRS Review*, 16 FCC Rcd at 22696 ¶ 55.

[658] *See, e g , Whitehall Enterprises, Inc* , 17 FCC Rcd at 17525 ¶ 49. *Accord EchoStar/DirecTV HDO*, 17 FCC Rcd at 20604 ¶ 98.

[659] *See, e g., 1992 Radio Ownership Order*, 7 FCC Rcd 2755; *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723

[660] Idaho Wireless Comments in MM Docket No 01-317 at 3, 9-10; *see also* North American Comments in MM Docket No 01-317 at 11

[661] UCC Reply Comments in MM Docket No. 01-317 at 17.

public."[662] Many outlets contribute to the dissemination of diverse viewpoints, and provide news and public affairs programming to the public. Elsewhere in this *Order*, we discuss in exacting detail the various sources of local news and information that are available to the public. Here, it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information

306 That, of course, does not mean that radio broadcasting is irrelevant to viewpoint diversity. We recognize that radio can reach specific demographic groups more easily than other forms of mass media.[663] Because of this, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small businesses, women, minorities, and other entrepreneurs seeking to meet a market demand or provide programming to underserved communities New entry promotes outlet diversity, which in turn enhances viewpoint diversity and the public interest Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only by ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry into the local media market by new and underrepresented parties.

307. *Programming Diversity* Some commenters argue that program diversity should be the paramount diversity concern in radio broadcasting.[664] The record is divided on the effect of consolidation on program diversity Some argue that the local radio ownership rule harms program diversity because greater concentration leads to more homogenized, less innovative programming.[665] Others argue that the rule encourages program diversity because greater concentration encourages the common owner to program in a manner that appeals to different audiences.[666]

308. In theory, program diversity promotes the public interest by affording consumers access to a greater array of programming choices We have long recognized that the most extreme example of zero program diversity – duplication of programming – generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve a community. For that reason, our rules restrict the ability of radio broadcasters to duplicate programming in the same community.[667] The corollary is that greater variety of differentiated programming advances the public interest by giving consumers in a local community more selection from which they can obtain programming to meet their varied interests

[662] *Associated Press v United States*, 326 U.S. 1 (1945)

[663] *See* MMTC Comments in MM Docket No 01-317 at 47

[664] *See, e g* , NAB Comments in MM Docket No 01-317 at 16, Clear Channel Comments in MM Docket No 01-317 at 14

[665] AFTRA Comments in MM Docket No 01-317 at 11; Hodson Feb 28, 2002, Comments at 5-6; Amherst Comments in MM Docket No. 01-317 at 3.

[666] NAB Comments in MM Docket No 01-317 at 18-20, Radio South Comments in MM Docket No 01-317 at 2; Clear Channel Reply Comments in MM Docket No. 01-317 at 3; NAB Reply Comments in MM Docket No. 01-317 at 12, Zimmer Comments In MM Docket No 00-244 at 6; Citadel Comments in MM Docket No. 00-244 at 8.

[667] 47 C F R. § 73 3556

309 No party seriously disputes that greater program diversity promotes the public interest. The difficulty is in finding a way to measure program diversity in a coherent and consistent manner so that we can determine how it is affected by concentration.[668] The record indicates that different measures of format diversity produce strikingly different results

310. A number of commenters cite a recent study by Berry and Waldfogel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels.[669] This confirms, they argue, Steiner's claim that a monopoly broadcaster will provide more diverse programming than a number of competitive stations.[670] The evidence presented in MOWG Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act.[671] The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database, while Berry and Waldfogel uses the finer classification formats available in Duncan. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfogel imply increases in radio program diversity.

311. The relationship between radio formats and radio programming is investigated in a study by Peter DiCola and Kristin Thomson.[672] By searching through playlist data in *Radio and Records*, they found substantial overlap between the major radio formats. For example, they found that in August 2002, that Contemporary Hit Rock (CHR) Rhythmic and Urban shared 76% of the songs on their top 50 charts[673] Further, they found that the overlap had increased for some music format pairs and decreased for others[674] The considerable overlap between major format categories reported by DiCola and

[668] The relationship between concentration and program diversity is not necessarily linear One study examining the relationship between industry structure and variety in the music recording industry found that high and low levels of concentration result in less variety, while maximum variety is promoted at a moderately concentrated structure. In this study, that moderate concentration level corresponded with the top four firms capturing approximately half the market revenue *See* Peter J. Alexander, Product Variety and Market Structure, 32 J. ECON BEHAVIOR & ORG 207 (1997).

[669] Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116(3) Q J ECON 1009-25

[670] Steiner, *supra* note 403 *See infra* ¶¶ 313-14

[671] MOWG Study No. 11

[672] Future of Music Coalition Comments, *Radio Deregulation· Has It Served Citizens and Musicians?* by Peter DiCola and Kristin Thomson.

[673] Future of Music Coalition Comments at Table 4-1, at 56.

[674] For example, overlap in Top 50 charts for CHR Pop and CHR Rhythmic has increased by 14% from 1994 and 2002 *Id* at Table 4-2, at 60.

Thomson suggest far greater overlap between the Duncan formats which Berry and Waldfogel use The presence of substantial overlap between music formats that do not remain stable through time suggests that the number of formats is not a good measure of program diversity.

312 MOWG Study No 9 addresses the issue of diversity in radio by examining top 10 playlists across a sample of radio stations published by *Radio and Records*.[675] Overall, the results suggest that song diversity remained approximately flat from 1996 to 2001 MOWG Study No. 9 compared the total number of unique songs in top 10 playlists between 1996 and 2001 and found the number of songs changed from 1241 to 1228, a 1 percent decline.[676] MOWG Study No. 9 also constructed a measure to compare the difference of the top 10 songs played between radio stations.[677] The authors found that comparing stations within the same format led to an overall decline of 2 4% in top 10 playlist diversity.[678] A similar exercise, however, comparing radio stations in similar but different formats found a slight increase in diversity of 0 74% [679] The study also attempted to establish the direct link of songlist diversity and consolidation in the radio industry. Overall, the results suggest that consolidation in the radio industry neither helped nor hindered playlist diversity between radio stations.[680]

313. The studies on program diversity also do not draw a sufficiently reliable causal link between ownership concentration and the purported increase in format diversity. To establish that link, some commenters rely on the theory proposed by Peter Steiner in 1952 that a monopoly broadcaster will diversify programming to attract different groups with distinct listening preferences and thereby secure the largest total audience for advertisers, whereas broadcasters operating in a competitive environment would be more likely to duplicate formats if a majority of listeners prefer a particular format. According to these commenters, the Steiner theory supports the causal link between the increase in radio ownership concentration over the last few years and the asserted increase in format diversity.[681]

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[675] MOWG Study No. 9, Radio Market Structure and Music Diversity by George Williams, Keith Brown, and Peter Alexander (Sept 2002) ("MOWG Study No 9").

[676] *Id* at 9

[677] The technical details of this difference measure are described in the paper, but essentially the measure counts the number of times two different playlists do not share a song Thus if the top 10 songs of two stations share 4 songs, the distance measure would equal 6.

[678] MOWG Study No. 9 at 11

[679] *Id* at 13.

[680] MOWG Study No. 9 also attempted to establish the direct relationship between consolidation of radio stations in a market and the songlist diversity in that market through linear regression The results reported suggest that common ownership of radio stations in a market can increase playlist diversity. Unfortunately, inspection of the data suggest that this result may not be very robust The number of common radio stations in issues of *Radio and Records* examined between 1996 and 2001 is so few that that the result is driven by only a handful of radio station pairs. This remains to be an important question for further research

[681] *See, e g* , Clear Channel Comments, Hausman Statement at 12

314 Steiner's theory has produced much discussion and research in the economic literature,[682] and the Commission has itself recognized the theory that greater consolidation could lead to greater format diversity [683] After a careful review of the economic literature, however, we cannot confidently adopt the view that we should encourage more consolidation in order to achieve greater format diversity. Like many economic theories, the Steiner theory and its progeny rests on a number of assumptions. The ability of the theory to predict actual market results reliably therefore depends in large part on the accuracy of those assumptions. For example, Steiner assumes that viewers prefer only one type of programming; when viewers have lesser preferred substitutes, different results are produced. Moreover, competitive models perform better than monopoly in terms of diversity and consumer welfare when channel space increases [684] Changes in various other assumptions also may affect the results reached by the original Steiner model.[685] We need not review all of these assumptions here; it is sufficient that they exist and that their accuracy is open to debate. Although further research on the Steiner model may be fruitful, we cannot at this time rely on that model to accept the argument that greater consolidation leads to more format diversity in radio broadcasting.[686]

315 In light of this record, we cannot conclude that radio ownership concentration has any effect on format diversity, either harmful or beneficial. Accordingly, we do not rely on it to justify the local radio ownership rule.[687]

### 2. Attribution of Joint Sales Agreements

316 In the *Local Radio Ownership NPRM*, we sought comment on the appropriate regulatory treatment for radio Joint Sales Agreements (JSAs).[688] A typical radio JSA authorizes the broker to sell

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[682] Jack H. Beebe, in particular, has used the Steiner model to create a significantly more sophisticated model of program choice in broadcasting Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91(1) Q J ECON. 15 (1977)

[683] *Notice*, 17 FCC Rcd at 18530 ¶ 82 n.159

[684] Beebe, *supra* note 685 at 15.

[685] For example, taking advertising into account may change the results of the Steiner model. *See* Simon Anderson and Steve Coate, *Market Provision of Public Goods The Case for Broadcasting*, Working Paper (UVA and Cornell 2001)

[686] Even if the Steiner model is an accurate model of program choice in broadcasting, we would not necessarily conclude that greater consolidation in radio broadcasting would serve the public interest As explained above, consolidation may have certain negative effects on innovation and program quality that outweigh any asserted increase in program diversity. Because we do not rely on the Steiner model here, we do not attempt to undertake a balancing of those competing interests at this time

[687] We leave open the possibility that, after further research, additional evidence may be adduced to establish the link between ownership concentration and format diversity. If such a link can be shown, we will consider the implications of that link on the local radio ownership rule at that time

[688] As we stated in the *Notice*, as a general matter, we are not reviewing our attribution rules as part of the biennial review process. *Notice*, 17 FCC Rcd at 18506 ¶ 7 n 13. However, we specifically sought comment in the *Local Radio Ownership NPRM* on whether to attribute radio JSAs. Therefore, we will consider changes to our attribution rules only in this one context Because we did not raise the issue of whether to change our current (continued. .)

advertising time for the brokered station in return for a fee paid to the licensee. Because the broker normally assumes much of the market risk with respect to the station it brokers, JSAs generally give the broker authority to hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising Currently, JSAs are not attributable under the Commission's attribution rules. Therefore, radio stations subject to JSAs do not count toward the number of stations the brokering licensee may own in a local market.

317 Based on the record in this proceeding, and on our experience with JSAs and our local radio ownership rules, we will now count the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. Specifically, we have concerns regarding the impact of in-market JSAs on competition in local radio markets. We do not believe that out-of-market JSAs pose the same economic concerns Therefore, JSAs will not be attributable when a party does not own any stations or have an attributable interest in stations in the local market in which the brokered station is located.[689]

318. In considering revisions to our attribution rules, we have always sought to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under our ownership rules.[690] As with LMAs, JSAs are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Nothing in the record indicates that licensees abdicate control over stations that are subject to JSAs. However, we find that the use of in-market JSAs may undermine our continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.[691] Where we have referred to *influence*, we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder. Our judgment as to what level of influence should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its

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policy regarding non-attribution of television JSAs, we will not consider any changes in this *Order*. We will issue a future Notice of Proposed Rulemaking to seek comment on whether or not to attribute television JSAs

[689] For instance, consider a licensee that owns a radio station in the Cleveland, Ohio, radio metro, and has a JSA for a radio station in the Akron, Ohio, radio metro The broker owns no stations in the Akron, Ohio, market The JSA in the Akron, Ohio, market therefore would not be attributable. However, in-market JSAs will be attributable regardless of whether the advertising time for the station is sold in conjunction with commonly owned stations in the same market, or with stations in distant markets. The potential for influence over the brokered station would exist under both scenarios.

[690] *Attribution of Ownership Interests*, 97 F.C C 2d 997, 999, 1005 (1984), ("*1984 Attribution Order*") *on recon*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986), *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121

[691] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2788 ¶ 64; *Attribution NPRM*, 10 FCC Rcd 3606, 3609 ¶ 4 (1995) (*quoting 1984 Attribution Order*, 97 F C.C.2d at 999)

programming and other core operational decisions[692]

319 We find that where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power Many times, the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to an LMA,[693] or sell advertising time for stations pursuant to a JSA. "Control over spot sales by one station affords significant power over the other "[694] Thus, JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. JSAs put pricing and output decisions in the hands of a single firm. Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market.

320. We have not previously attributed JSAs based on our earlier conclusion that JSAs do not convey sufficient influence or control over a station's core operations to be considered attributable.[695] While we have recognized the DOJ's concerns as to the impact of same-market radio JSAs on competition, we noted that the DOJ and the Commission's concerns may differ in certain respects.[696] We have previously distinguished JSAs and LMAs, finding that only LMAs have the ability to affect programming, personnel, advertising, physical facilities, and other core operations of stations.[697] There are several reasons for our policy change. Upon reexamination of the attribution issue, we find that, because the broker controls the advertising revenue of the brokered station, JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution.[698] As with LMAs, licensees of stations subject to JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.

[692] *Attribution NPRM*, 10 FCC Rcd at 3610 ¶ 4

[693] LMAs typically provide that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered station

[694] *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121

[695] *Id* at 12612 ¶ 122 However, we left open the possibility that JSAs could threaten competition, and retained discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns. *Id* at 12613 ¶ 123 *See, e g , Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp (Transferee)*, 17 FCC Rcd 10828 (2002)

[696] *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[697] *Id*

[698] In 1996, we revisited the issue of whether to attribute JSAs. *See Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 11 FCC Rcd 19895, 19911 (1996) ("*1996 Attribution FNPRM*") We considered whether JSAs present diversity and competition concerns, and whether a company could potentially exert market power by controlling a certain amount of the advertising revenue share in the market. In declining to attribute JSAs, we concluded that they do not convey the degree of influence or control over station programming or core operations such that they should be attributed *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122